# The changing nature of the public administration: Innovations and challenges for public lawyers

# The Changing Nature of the Public Administration: Innovations and Challenges for Public Lawyers

Carlo Colombo* & Mariolina Eliantonio**

## 1 THE TRANSFORMATION OF THE PUBLIC SPHERE: FRAGMENTATION AND INTERCONNECTION

We live in an era of impressive change, to which administrative law does not appear to be immune. Particularly, the transformation of the state and of its role in society have direct bearing on administrative law. The classic configuration of administrative systems as characterized by strict verticality and *imperium*, by bureaucracy executing the will of parliament, and by mechanisms and rules enclosed within national boundaries seems unfit to capture alternative paradigms for the exercise of administrative activities. Privatization, the politicization of administration, the expanded use of regulatory techniques, alongside the rise of participatory rights and new public management, are only some of the main developments that, over the past decades, have broken up the uniform and undivided pattern of administrative law.

Nowadays, however, a more profound transformation is pervading our society and its traditional power structures. As Habermas first noted,[1] the public sphere, meaning the locus of critical public discussion on matters of common concern, is changing shape to involve new actors, dynamics, and structures. A more open, publicly relevant arena is emerging, in which decisions affecting the general interest are either co-defined or privatized. As a consequence, power is becoming fluid and fragmented across a large set of actors, interconnections based on mutual dependence are materializing from the erosion of public sovereignty to form new

* Post-doctoral researcher at the Tilburg Center for Regional Law and Governance (Tilburg Law School – Tilburg University). This article is based on the research carried out within the NWO-funded project 'Smart transformation in city-regional law and governance'. Email: c.m.colombo@uvt.nl

** Professor of European and Comparative Administrative Law and Procedure at the Maastricht Center for European Law (Maastricht University). Email: m.eliantonio@maastrichtuniversity.nl

1 Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (translated ed., MIT Press 1991).

Colombo, Carlo & Eliantonio, Mariolina. 'The Changing Nature of the Public Administration: Innovations and Challenges for Public Lawyers'. *European Public Law* 24, no. 3 (2018): 403–410.

institutional constellations, and counterforces are emerging in reaction to this shift. At the same time, what is public has gained in complexity and can no longer be equated with the state. Emergence of the information society has transformed this picture even more, as the public arena shifts from a physical space to a communication network, and new powers surface in a complex 'global' dialectic.[2]

While this process is not entirely new and has not replaced the old state structures, the scale and depth at which it is taking place seem remarkable. The new power dynamics emerging in many policy areas and at different levels can be explained by multiple forces: globalization and the rise of global value chains; budgetary cuts and the financial crisis of the state; the need to manage complex and knowledge-intensive activities and the rise of the information society; the securitization of every economic organization and activity; the common quest for new forms of legitimization; and the power vacuum in some key areas. These depict a role for the state as enabler, as partner, or simply as spectator in new initiatives where public decisions are either co-exercised or even outsourced.

Administrative law is caught in a bind by this reconfiguration of the public sphere.[3] The classic intellectual categories and concepts of administrative law developed appear inadequate to grasp the full meaning of a reality in which the once-considered main actor in administrative law (the state) is shrinking and restricting its role in favour of other societal forces. Scholarly research on this transformation and the legal challenges it poses can be clustered in three main strands.

The first is scholarship concerned very broadly and loosely with the transformation of administrative law. Definitions abound as to what the transformation of the administration entails, spanning from mixed administration[4] to negotiated administration,[5] governance,[6] legal hybrids,[7] and collaborative structures.[8]

---

2 Manuel Castells, *The Rise of the Network Society* (2d ed., Wiley-Blackwell 2010).

3 For a good overview of the problem, *see* Sabino Cassese, *New Paths for Administrative Law: A Manifesto*, 10(3) Int'l J. Const. L. 603 (2012); Sabino Cassese, *The Administrative State in Europe*, in *The Max Planck Handbooks in European Public Law Vol. 1: The Administrative State* 57–97 (Armin von Bogdandy, Peter Huber & Sabino Cassese eds, Oxford 2017).

4 Mark Aronson, *A Public Lawyer's Response to Privatization and Outsourcing*, in *The Province of Administrative Law* (Michael Taggart ed., Hart Publishing 1997).

5 *Negotiated Decision-Making* (Boudewijn de Waard ed., Boom Juridische Uitgeverij 2000).

6 Martin Shapiro, *Administrative Law Unbounded: Reflections on Government and Governance*, 8(2) Ind. J. Global Legal Stud. 369–377 (2001).

7 Patrick Birkinshaw, Ian Harden & Norman Lewis, *Government by Moonlight: The Hybrid Parts of the State* (Unwin Hyman 1990); Lorenzo Casini, *Global Hybrid Public-Private Bodies: The World Anti-Doping Agency (WADA)*, Int'l Org. L. Rev. 438 (2009).

8 Lisa Blomgren Amsler, *Collaborative Governance: Integrating Management, Politics, and Law*, 76(5) Pub. Admin. Rev. 700–711 (2016); Jody Freeman, *Collaborative Governance in the Administrative State*, 45(1) UCLA L. Rev. 1–98 (1997).

Research in this regard has focused predominantly on the types of rules applicable to the new institutions and on the mechanisms arising to exercise public functions, as well as on the resulting understanding of administrative law. According to some scholars, the public-private divide is still relevant to infuse public values in activities exercised in the general interest, although the frontier may well vary depending on the sector, context, and legal system;[9] for others, this distinction has become blurred or even outdated, with the emerging hybrid structures offering a potential replacement.[10] Different interpretations of administrative law emerge from this juxtaposition. While some claim that the new administrative law now surfacing is concerned with novel functions, such as steering, and with multilateral relations instead of bilateral and hierarchical interactions,[11] for others administrative law as a separate discipline has come to an end, leaving space for a re-feudalization or horizontalization of legal institutions.[12] Scholarly work, however, is fragmented, both vertically, with contributions mainly covering either one level of government or specific case studies, and horizontally, with research taking mainly the conventional cross-country approach of comparative studies.[13] What is missing is a clear empirical and cross-sectoral analysis that, while focusing on the general dynamics of administrative law as operating in different legal systems, discusses concrete examples of the transformation of the public sphere and analyses the consequences thereof for the core elements of the discipline.

Undoubtedly pioneering in this strand is the research carried out by Napolitano[14] and Bignami.[15] The former draws an innovative model that presents

---

[9] Alfred C. Aman Jr., *Politics, Policy and Outsourcing in the United States: The Role of Administrative Law*, in *Administrative Law in a Changing State. Essays in Honour of Mark Aronson* (Linda Pearson, Carol Harlow & Michael Taggert eds, Bloomsbury 2008); Peter Cane, *Accountability and the Public/Private Distinction*, in *Public Law in a Multi-Layered Constitution* (Nicholas Bamforth & Peter Leyland eds, Oxford 2003); *The Public Law/Private Law Divide. une entente assez cordiale? La distinction du droit public et du droit privé: regards français et britanniques* (Mark Freedland & Jean-Bernard Auby eds, Bloomsbury 2006); Gerdy Jurgens & Frank van Ommeren, *The Public Private Divide in English and Dutch Law: A multifunctional and Context Dependant Divide*, 71 Cambridge L.J. 172, 175–181 (2012).

[10] *See After Public Law* (C. Mac Amhlaigh, C. Michelon & N. Walker eds, Oxford 2013); Dawn Oliver, *Common Values and the Public-Private Divide* (Cambridge 1999).

[11] Eberhard Schmidt-Assmann, *Principes de base d'une réforme du droit administratif. Parties 2 et 3*, 28(4) Revue Française De Droit Administratif 667 (2008); Wolfgang Kahl, *What Is 'New' About the 'New Administrative Law Science' in Germany*, 16(1) Eur. Pub. L. 105 (2010); Karl-Heinz Ladeur, *The Evolution of General Administrative Law and the Emergence of Postmodern Administrative Law*, Osgoode Hall Law School Research Paper Series no. 16 (2011).

[12] Alain Supiot, *The Public–Private Relation in the Context of Today's Refeudalization*, 11(1) Int'l J. Const. L. 129–145 (2013).

[13] *See* for instance the different analyses contained in *The Public-Private Divide: Potential for Transformation?* (M. Ruffert ed., BIICL 2009).

[14] Giulio Napolitano, *Conflicts and Strategies in Administrative Law*, 12(2) Int'l J. Const. L. 357–369 (2014); Giulio Napolitano, *La logica del diritto amministrativo* (2d ed., Il Mulino 2017).

[15] Francesca Bignami, *From Expert Administration to Accountability Network: A New Paradigm for Comparative Administrative Law*, 59 Am. J. Comp. L. 859 (2011).

administrative law as a multipolar and multi-agent tool, where rules and institutions evolve along with the changing society. In an arena made up of conflicts and coalitions, administrative law is thus understood as a device that transforms itself, but remains true to its old goals of empowering and controlling public authorities. The latter argues that the classic depiction of administrative law as framed by rules and judicial accountability mechanisms is too narrow. The author advances a new paradigm focusing on the multitude of accountability networks in which public powers are nowadays embedded. Yet, while both authors agree that administrative law is still alive and new actors and structures are emerging, they seem to provide little empirical exploration to test their hypotheses and demonstrate how and to what extent the traditional mechanisms of administrative law have changed in the new social order.

The second strand of scholarship dealing with the transformation of the public power is the global administrative law project, which studies the fluid regulatory space emerging at the global level. This literature has brought a ground-breaking perspective to the discussion.[16] In it, the paradigms of administrative law serve to ensure the accountability of new institutions or boards operating beyond the influence of any sovereign power, as well as to identify and infuse public principles and values to guide otherwise insulated decision-makers beyond the hybridization of rules.[17] However, this scholarship has been slowed down by a setback of global institutions, and it has, moreover, failed to fully capture the interplay between the global sphere and other levels of government, each characterized by its own rules and principles, and the possibility to develop fruitful integration or interaction among them.

The third strand involves the interdisciplinary studies of regulation and governance, as well as of law and sociology. Scholars in the first group have contributed to developing a fresh theoretical and empirical understanding of the transition from government to governance and the emergence of networked structures that challenge the market–hierarchy–society trichotomy.[18] While pure governance theory is mostly interested in questions of efficiency and legitimacy, its interdisciplinary interaction with legal scholarship has produced a holistic

---

16 Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 L. Contemp. Probs 15 (2005); Jean-Bernard Auby, *Globalisation, Law and the State* (Hart Publishing 2017); Gordon Anthony, Jean-Bernard Auby, John Morison & Tom Zwart, *Values in Global Administrative Law* (Hart Publishing 2011).

17 Lorenzo Casini, *'Down the Rabbit-Hole': The Projection of the Public/Private Distinction Beyond the State*, 12(1) Int'l J. Const. L. 402–428 (2014).

18 For a good overview, *see* Shauhin Talesh, *Public Law and Regulatory Theory*, in *Handbook on Theories of Governance* 102 (C. Ansell & J. Torfing eds, Edward Elgar 2016); *Comparative Law and Regulation. Understanding the Global Regulatory Process* (Francesca Bignami & David Zaring eds, Edward Elgar 2016).

conceptualization of the operation of the regulatory process and the effects of the different accountability fora and instruments on governance structures. Law and sociology has instead questioned and investigated the shift in the allocation of responsibilities from public to private actors in fundamental spheres of public interests emerging from two seemingly contrasting forces: globalization and individualization.[19] However, both interdisciplinary perspectives seem to require further investigation to clarify how the classic paradigms and instruments of administrative law hold up under this change and, specifically, the ability of the rules and mechanisms of the discipline to allow for legitimate and accountable decision-making processes.

By adopting an empirical perspective that cuts across governance levels and policy fields, this special issue aims to fill the gaps identified in the three main streams of scholarship sketched above. It identifies common trends and variations in how the dynamics of administrative law change when new actors and multi-actor organizations emerge to govern the public sphere. What can still be considered as administrative authority and administrative action in this complex new reality, and how are these connected to the rest of society? To what extent are the foundational categories – discretion, powers, administrative act and procedure, judicial review – and principles of administrative law – such as legality, public accountability, proportionality, legitimate expectations, impartiality and independence, equality and the like – changing to accommodate instances in which core public functions are either co-exercised with or outsourced to other societal actors?

## 2 THE CHANGING NATURE OF THE PUBLIC SPHERE AND THE CHALLENGES TO ADMINISTRATIVE LAW

The papers contained in this special issue show that the classic paradigms and categories of administrative law are, at best, challenged when the new public sphere, as conceptualized above, is taken into consideration. Starting from the most 'primordial' ones, the very notions of an administrative act (intended as unilateral act adopted by an administrative authority) and administrative action (intended as action imputable to an administrative authority) seem to be strained. For example, *Eliantonio* demonstrates that the concept of imputability of an act to the European institutions is hard to apply to measures that are the product of private bodies, although they originate from a mandate of the European Commission and are endowed with public law consequences for the purposes of

[19] *See* e.g. Peter Mascini, Menno Soentken & Romke van der Veen, *From Welfare to Workfare – The Implementation of Workfare Policies*, in *The Transformation of Solidarity: Changing Risks and the Future of the Welfare State* 165–190 (Romke van der Veen, Mara Yerkes & Peter Achterberg eds, Amsterdam University Press 2012).

internal market rules. Furthermore, as *Jenart* shows, the hybrid nature of a global organization might also have consequences for the binding nature and enforceability of its acts at national level, as is the case for acts emanating from the World Anti-Doping Agency. In general, the emergence of complex collaborative structures calls for a rethinking of notions such as administrative act and public administration.

Secondly, the hybrid nature of a governance structure might have implications for the applicability of general principles of administrative law. *Röttger-Wirtz*, for example, discusses the issues of independence and impartiality of administrative action in the case of the International Council for Harmonisation, a body responsible for the production of widely followed pharmaceutical standards. Its public-private membership poses a specific challenge to the independence and impartiality of regulators, two principles which the European Union (EU) is bound to respect, even when globally developed standards are implemented into EU soft law. *Eliantonio* similarly discusses the limitations of the principles of transparency and participation which arise from the mixed nature of the process of European standardization. It might be concluded that, in these innovative forms of exercising public functions, the scope of applicability of general principles of administrative law needs to be redefined so as not to create spaces in which the pursuit of public interest becomes marginalized.

Thirdly, the availability and desirability of judicial review represents a major challenge in this changed public order. *Marique* and *Van Garsse*, for example, discuss the role of courts in contractual and non-contractual disputes arising in the context of major infrastructure projects developed by public-private partnerships. They show that, within the overall accountability framework, judges play a limited role in protecting citizens' rights when dealing with public bodies and economic actors. *Eliantonio* also pinpoints hurdles facing judicial accountability in the framework of the European standardization process. Finally, *Colombo* links the desirability of judicial review to the concept of discretion, showing that the traditional approach to judicial review of discretionary power is ill-suited to collaborative forms of local governance in which decision-making power is horizontally shared across a set of actors. To ensure that collaborative structures operate in the general interest, it therefore seems necessary to redefine the role that judicial review ought to play, and to study the interconnections between civil law and administrative law litigation, as well as the impact of available alternative mechanisms of accountability.

Fourthly, a number of papers explores the challenges that materialize when, due to the complex transformation of our society and of its human activities, private parties become crucial actors in discharging public functions. For example, *Nellen* focuses on the public role of private parties as 'unpaid tax collectors'

emerging from the cross-national scope of the EU value added tax (VAT) system. He observes that information asymmetries might impair this task and claims that imposing information disclosure on the counterparty would allow private parties to rebalance these asymmetries. Along similar lines, *Butler* questions whether different regulatory regimes are justifiable in the case of data protection, where private parties are inevitably required to exercise public functions and thus operate as a 'hand' of the public administration. *Peeters* shows that when wicked social problems, such as risks to the environment, cross existing territorial and public-private boundaries, non-governmental organizations (NGOs), such as environmental NGOs, constitute a new public civil society that may act to promote the general interest in the supranational arena. However, she concludes that the high cost and length of court procedures might seriously hinder NGOs' efforts to carry out these tasks effectively. Overall, these papers demonstrate that, while the general scholarly discourse centres on the fear of private parties may be 'shielded' from public law obligations, this organizational model is sometimes inevitable and precisely in those situations public law may serve to provide tools to protect the public interest.

In conclusion, the papers collected in this special issue point to an urgent need to reconsider the province of administrative law, including 'the public life of private actors'. First, it seems clear that, when public and private economic actors share public functions, this relationship triggers a chain reaction that pushes other actors to stand up as counterforces and promoters of the public interest, to prevent regulatory capture and opportunistic behaviour (as in the case of NGOs and citizens' representatives). Second, the emergence of various and multifaceted structures is shown to be valuable, as these models can deliver effective solutions (as the paper by *Philipsen* on the prevention of work-related accidents shows) and provide a high level of expertise (as is the case, for example, in processes of standard-setting, which *Eliantonio* and *Röttger-Wirtz* discuss, or in local collaborative structures, as shown in *Colombo*'s paper). However, the inherent risk of abuses requires that an architecture of guarantees be built, for which the current paradigms of administrative law, still anchored to a state-centric view, are unequipped. As *Barnes* suggests, it thus seems necessary to embrace a functional concept of public administration that is linked to the pursuit of the public interest, regardless of the actor involved, and a holistic view of administrative action which sees the role of public and private actors in a comprehensive fashion. In this sense, while both the traditional vertical connotation of administrative law and the juxtaposed horizontalization of rules appear unfit to describe the changed public sphere, a more complex bundle of private and public provisions, each one fulfilling clear roles and objectives, would seem to provide a more comprehensive understanding of the new social order analysed in this special issue.

In sum, while nowadays the public sphere has changed, and the state seems to have lost its privileged position and means to protect and promote the public interest, the consequence ought not to be, it is argued, an 'eclipse' of administrative law. When new actors and activities emerge in the public arena, their role ought to be differentiated from the rest of society, given their publicly relevant connotation. The task for administrative law scholarship is therefore to make sense of this transformation and open a discussion over the creation of a comprehensive framework which provides for adequate guarantees against potential power abuses in collaborative structures.